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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL CALHOUN, Defendant and Appellant.	A101034 (Contra Costa County Super. Ct. No. 991523-2)

Darrell Calhoun appeals from a judgment committing him to Atascadero State Hospital for two years after a jury found him to be a sexually violent predator (SVP), as defined by Welfare and Institutions Code section 6600 (Sexually Violent Predator Act or SVPA).

In the published portion of this opinion, Section I, we shall hold that in a jury trial pursuant to the SVPA, the defendant is entitled to six peremptory challenges, as provided in California Code of Civil Procedure section 231, subdivision (c). We shall further hold that neither state nor federal due process or equal protection principles require that state law provide the defendant in such a proceeding the same number of peremptory challenges as in most criminal cases.

We will address defendant's remaining contentions in the unpublished portion of this opinion, and shall affirm the judgment.

* Under California Rules of Court, rules 976(b) and 976.1, only the Facts section, Part I of the Analysis, and the Conclusion are certified for publication.

FACTS

Two experts, Dr. Padilla and Dr. Starr, testified for the prosecution that defendant met the statutory requirements for commitment as a sexually violent predator. Defendant had two qualifying prior convictions for forcible rape, in 1989 and 1993.

In 1989, after Ada R. refused defendant's request for consensual sex, defendant beat her with a hammer, forced her to drive to a secluded location, and again attacked her with the hammer to obtain her compliance. He repeatedly forcibly raped and sodomized her. He continued his sexual assaults upon her, even after she was forced to defecate in the car. After several hours, he tied her up, forced her into the trunk of the car, and drove to Oakland, where he resumed forcibly raping and sodomizing her. Later, he drove around with her, and became apologetic. She eventually escaped.

In 1993, defendant approached Catherine K. on the street and offered her drugs in exchange for sex. When she refused, he told her he had a gun and forced her into the basement of a nearby house. He threatened to kill her, and repeatedly raped her and forced her to perform oral copulation. He did not release her until the next morning.

Drs. Padilla and Starr also noted several other sexual offenses. In 1993, a few hours before the assault on Catherine K., defendant entered the home of L.M. He threatened her with a box cutter and attempted to sexually assault her. The attempt was thwarted when defendant heard her children making noise, and he fled out the back window. This attempted assault, and the forcible rape and sexual assault on Catherine K., occurred only five months after he was released on parole for the rape of Ada R. Drs. Padilla and Starr also referred to additional uncharged incidents involving a victim named Debbie and two others.

Both doctors diagnosed defendant as suffering from paraphilia not otherwise specified, alcohol and cocaine abuse, personality disorder not otherwise specified with antisocial features, and various learning disorders. They both testified that defendant's score on the Static 99 test fell within the highest range for likelihood of reoffending. They both also identified numerous factors in defendant's history that distinguished him from a person who committed rape, but who would not be a sexually violent predator

within the meaning of the SVPA. Dr. Starr testified that in her opinion, it was not even a close call, and that defendant was very likely to commit new sexually violent predatory offenses if released.

The defense also presented two experts, Dr. Donaldson and Dr. Shore. Dr. Donaldson testified that defendant did not suffer from paraphilia, although Dr. Donaldson used a different definition than the one used in the DSM. In Dr. Donaldson's opinion, defendant had no strong drive to rape. He preferred consensual sex, but lacked the skills to acquire it. Based upon the Static 99 and Dr. Donaldson's clinical and practical judgment, defendant would be at high risk of reoffending if returned to his old community.

Dr. Shore testified that defendant did not suffer from paraphilia. He did not commit rapes out of any compulsion or drive for nonconsensual sex. Instead, as a result of severe cognitive deficits, he misunderstood his relationships with his victims, and believed the sex was consensual. Dr. Shore, however, also found that if released without supervision, defendant likely would rape again.

ANALYSIS

I.

Peremptory Challenges

Section 231 of the Code of Civil Procedure[1] specifies that in a criminal case, where the penalty may be death or life in prison, each side is allowed 20 peremptory challenges. In most other criminal cases the parties are each allowed 10. (§ 231, subd. (a).) In civil cases, and in criminal cases where the offense is punishable with a maximum term of imprisonment of 90 days or less, the parties are allowed six. (§ 231, subds. (b) & (c).)

The trial court ruled that a commitment proceeding pursuant to the SVPA is a special proceeding of a civil nature, and therefore the parties were entitled to six peremptory challenges pursuant to subdivision (c) of section 231. Defendant contends

[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

that the court should instead have applied subdivision (a) because a proceeding under the SVPA is more like a criminal case than a civil proceeding. He further contends that state and federal constitutional principles of due process and equal protection require that he be allowed the same number of peremptory challenges as are provided to a defendant in the trial of a criminal offense.

1. Section 231

The SVPA does not specify the number of peremptory challenges that are available to the parties, and no published decision has yet resolved the issue. Nevertheless, the trial court's conclusion that subdivision (c) of section 231 applies to a jury trial of a petition pursuant to the SVPA logically follows from decisions of our Supreme Court and the courts of appeal, which have held that section 231, subdivision (c) applies to "special proceedings" that are civil in nature; and that a sexually violent predator trial is a civil proceeding, or a special proceeding of a civil nature.

In *People v. Stanley* (1995) 10 Cal.4th 764 (*Stanley*), the court reiterated its long-held view that in a civil proceeding, or a special proceeding that is civil in nature, the number of peremptory challenges available to the parties is the same as that in civil cases, even where the special proceeding arises in the context of a criminal trial. In *Stanley,* the defendant argued that, in a proceeding to determine his competence to stand trial in a capital case, the trial court erred by failing to accord the parties the same number of peremptory challenges as would be available to a defendant in a criminal trial of the underlying offense. The court found the argument "meritless." (*Id.* at p. 807.) It explained: " 'A proceeding to determine the mental competence of a criminal defendant to stand trial pursuant to . . . [Penal Code] section 1368 is a special proceeding civil in nature.' [Citations.] Consistent with this view, this court has held the parties in a section 1368 proceeding are entitled only to the number of peremptory challenges provided for in civil trials, even if the underlying offense is punishable by death or life imprisonment. [Citation.]" (*Ibid.*)[2]

[2] The rules of civil discovery have also been held to apply in a competence trial. (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 490-491.)

Both our Supreme Court and the courts of appeal have consistently held that the SVPA is a *civil* commitment scheme. The Legislature declared its intent was to establish a "civil commitment" scheme applicable to persons who are to be viewed "not as criminals, but as sick persons" (Welf. & Inst. Code, § 6250) when it enacted the SVPA. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171 (*Hubbart I*), citing Stats. 1995, ch. 763, § 1; Sen. Com. on Crim. Procedure, Analysis of Assem. Bill. No. 888 (1995-1996 Reg. Sess.) July 11, 1995.) The legislative intent to create a civil commitment scheme is further reflected in the decision to place the SVPA "in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups. (See, e.g., Welf. & Inst. Code §§ 5000 [LPS Act], 6500 [Mentally Retarded Persons Law].)" (*Hubbart I, supra,* at p. 1171.) The courts have also recognized these other commitment schemes to be " 'civil in nature' (*In re Bevill* (1968) 68 Cal.2d 854, 858 [Mentally Disordered Sex Offenders Act] or as 'special proceedings of a civil nature' (*Gross v. Superior Court* (1954) 42 Cal.2d 816, 820 [sexual psychopath proceedings of former § 5500 et seq.].)" (*Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 680 (*Leake*).) In *Cooley v. Superior Court* (2002) 29 Cal. 4th 228, 250 (*Cooley*), the court again described SVPA proceedings as "civil in nature," and held that Evidence Code section 115 applied, but that the applicable standard of proof for a probable cause hearing fell within the "except as otherwise provided" proviso. Our Supreme Court has also rejected the contention that, despite its civil label, the SVPA is so punitive in purpose and effect that it imposes additional criminal punishment, in violation of the ex post facto clause, when commitment is based on offenses committed before its effective date. (*Hubbart, supra,* at pp. 1170-1179.)

At least two court of appeal decisions have also reached the conclusion that proceedings under the SVPA are special proceedings of a civil nature, and therefore civil, not criminal, discovery rules apply. (*People v. Superior Court* (2001) 94 Cal.App.4th 980, 988 *(Cheek)*; *Leake, supra,* 87 Cal.App.4th at p. 680; see also *Sporich v. Superior Court* (2000) 77 Cal.App.4th 422, 427 [court assumes Civil Discovery Act applies to a

request for an additional mental examination prior to a SVPA proceeding after defendant has already been examined by two psychologists or psychiatrists].) In *Cheek*, *supra*, the court explained: "The Civil Discovery Act applies in both 'a civil action and a special proceeding of a civil nature.' [Citation.] A special proceeding of a civil nature is '[a] type of case which was not, under the common law or equity practice, either an action at law or a suit in equity.' [Citations.] 'A special proceeding has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief.' [Citation.] [¶] The California Supreme Court has stated that a proceeding under Welfare and Institutions Code section 1800, in which the California Youth Authority petitions the court to retain a physically dangerous ward beyond his or her release date in order to provide treatment for the cause of the dangerousness, has a 'demonstrably civil purpose' and hence is a special proceeding of a civil nature. [Citation.] *Similarly, an SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action.* As in other special proceedings of a civil nature, the Civil Discovery Act is applicable." (*Cheek*, at p. 988, italics added.) In *Leake, supra*, the court also held that "the Legislature designed the SVPA as a civil action or special proceeding of a civil nature," and therefore the Civil Discovery Act of 1986 applied. (*Leake,* at p. 680.)

The major premise established by *Stanley, supra*, 10 Cal.4th 764, is that section 231, subdivision (c), which provides for six peremptory challenges in civil cases, applies to "special proceedings" that are civil in nature, even where the civil proceeding relates to competence to stand trial for a serious criminal offense. The minor premise, established by the express declaration of the Legislature in the SVPA itself, by the holdings in *Leake, supra*, 87 Cal.App.4th 675 and *Cheek, supra,* 94 Cal.App.4th 980, and indirectly by the recognition of the civil purpose and effect of the SVPA in *Hubbart I, supra,* 19 Cal.4th 1138, is that a commitment under the SVPA is a special proceeding that is civil in nature. The conclusion that logically follows is that subdivision (c) of section 231 applies to a

SVPA proceeding, and therefore defendant received all the peremptory challenges to which he is entitled by statute.

Defendant attempts to evade the logical force of this syllogism by arguing that, unlike the competence trial at issue in *Stanley, supra*, 10 Cal.4th 764, the SVPA expressly provides for procedural protections, such as a unanimous verdict and the beyond a reasonable doubt standard of proof, that are normally provided for only in a criminal trial. (Welf. & Inst. Code, § 6603.) He suggests that the incorporation of these criminal procedural protections into the statutory scheme compels the conclusion that despite its civil "label," a proceeding under the SVPA is really more akin to a criminal trial and the Legislature must have intended that a defendant also receive the same number of peremptory challenges as a defendant in a criminal prosecution. In *Hubbart I, supra,* 19 Cal.4th 1138, albeit in the context of an ex post facto challenge, the court rejected a similar contention that the incorporation of some criminal procedural safeguards into the SVPA compelled the conclusion that the scheme was civil in name only. As the court stated in *Hubbart*: "[T]the use of procedural safeguards traditionally found in criminal trials [does] not mean that commitment proceedings [are] penal in nature." (*Hubbart,* at p. 1174, fn. 33; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 364-365[3] ["that Kansas chose to afford such [criminal] procedural protections does not transform a civil commitment proceeding into a criminal prosecution"]; *Cooley, supra*,

[3] In *Kansas v. Hendricks*, *supra*, 521 U.S. 346, the court rejected the contention "that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. In *Allen*, we confronted a similar argument. There, the petitioner 'place[d] great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials' to argue that the proceedings were civil in name only. 478 U.S., at p. 371. We rejected that argument, however, explaining that the State's decision 'to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions.' *Id.*, at p. 372. The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution." (*Id*. at pp. 364-365.)

29 Cal. 4th at p. 252 [civil character of SVPA commitment scheme does not preclude incorporation of some criminal procedural safeguards]; see also *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1410 [fact that some criminal procedural protections are incorporated in a proceeding to extend the commitment of a mentally disordered offender does not compel conclusion that proceeding is criminal or that all criminal procedural safeguards must apply].) We therefore will not infer that the Legislature had any intention of transforming a commitment scheme it declared to be civil into a criminal proceeding for the purpose of determining how many peremptory challenges are available to the parties, simply because it incorporated some criminal standards into the SVPA. Indeed, the contrary inference we draw is that, by declaring its intent that the commitment scheme be civil, and expressly providing for some criminal procedural standards to apply, but not others, the Legislature evinced its intent that, unless it otherwise expressly provided, rules governing civil proceedings would apply.

We also note that the SVPA was modeled upon a civil commitment scheme adopted in the State of Washington. (See Sen. Com. on Appropriations, Rep. on Assem. Bill No. 888 (1995-1996 Reg. Sess.) July 17, 1995.) At the time the bill to enact the SVPA was pending in the California Legislature, the Washington State Supreme Court, in 1993, had filed a comprehensive decision, *In Re Young* (1993) 122 Wash.2d 1 [857 P.2d 989], which rejected various due process and ex post facto challenges to the Washington scheme. The Washington court also specifically rejected the contention that the defendant should have the same number of peremptory challenges provided under Washington law to criminal defendants in capital cases because the consequence of commitment was equivalent to "indefinite incarceration." The court held *the parties were entitled only to the same number of challenges provided for civil juries* because the proceedings "are civil, not criminal, in nature." (*In re Young, supra,* 857 P.2d at pp. 1012-1013.) Our state Legislature was clearly aware of this decision when it enacted the SVPA, because the legislative history contains several references to the decision in *In re Young, supra*, albeit primarily in the context of analyzing potential due process and ex post facto issues raised by the proposed statutory schemes. This legislative history

reinforces the inference that our state Legislature intended a defendant in an SVPA proceeding to have the same number of peremptory challenges as are available in other special proceedings that are civil in nature.

For all of the foregoing reasons, we conclude that a proceeding under the SVPA is a special proceeding of a civil nature, and therefore pursuant to subdivision (c) of section 231, defendant was entitled to six peremptory challenges.

2. Due Process

Defendant next argues that, regardless of the applicable statutory provisions, state and federal constitutional due process principles require that he be granted the same number of peremptory challenges as are provided to criminal defendants. His reliance upon *People v. Burnick* (1975) 14 Cal.3d 306 (*Burnick*) and *People v. Feagley* (1975) 14 Cal.3d 338 (*Feagley*) is misplaced. In those cases, the court held that although a commitment under the version of the Mentally Disordered Offender statute then in effect was civil, in light of the deprivation of liberty for an indeterminate period under conditions often indistinguishable from incarceration in prison, due process required that the offender is entitled to the right to proof beyond a reasonable doubt (*Burnick,* at p. 322) and to a unanimous verdict (*Feagley,* at p. 352). Defendant contends these cases stand for the proposition that a defendant in an SVPA proceeding " 'is entitled to the *full panoply of the relevant protections which due process guarantees in state criminal proceedings*. He must be afforded *all those safeguards which are fundamental rights and essential to a fair trial*.' " (*Burnick,* at pp. 317-318.)

The primary flaw in defendant's argument is that " '[n]either the United States Constitution nor the Constitution of California . . . requires that Congress or the California Legislature grant peremptory challenges to the accused . . . or prescribes any particular method of securing to an accused . . . the right to exercise the peremptory challenges granted by the appropriate legislative body. [Citations.] *The matter of peremptory challenges rests with the Legislature, limited only by the necessity of having an impartial jury*.' " (*People v. Brown* (1996) 42 Cal.App.4th 461, 475-476.) In *Conservatorship of Gordon* (1989) 209 Cal.App.3d 364 (*Gordon)*, the court rejected an

analogous contention, based upon *Burnick*, *supra*, 14 Cal.3d 306 and *Feagley, supra,* 14 Cal.3d 338, that because state constitutional principles of due process required that a conservatee have the right to a jury trial, unanimous verdict, and proof beyond a reasonable doubt, the conservatee must also be entitled to the same number of peremptory challenges as provided to a criminal defendant. The court explained that the right and number of peremptory challenges is "not a constitutional necessity but a statutory privilege," and "peremptory challenges are not mandated by due process." (*Gordon,* at pp. 368-369.) Therefore, the conservatee's due process rights were not violated when the court provided only six peremptory challenges pursuant to section 231, subdivision (c). (*Ibid.*)

The United States Supreme court also has "long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury, [but also] that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, *peremptory challenges are not of federal constitutional dimension*." (*United States v. Martinez-Salazar* (2000) 528 U.S. 304, 311, italics added; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 90-91 [no federal due process violation where state law forced use of a peremptory challenge to cure a trial court's error in denying a challenge for cause].)

The Legislature has clearly expressed its intention that an SVPA proceeding be a civil proceeding, and we have found that defendant was accorded all the peremptory challenges to which he was entitled under state law. Neither state nor federal due process principles compel that he be granted any specific number of challenges, and in the absence of some demonstration that he was deprived of his right to an impartial jury, no due process violation occurred.

3. Equal Protection

Nor is there any merit to defendant's assertion that allowing him only six peremptory challenges deprives him of equal protection of the laws. Defendant argues that, under the SVPA, if the allegations of the petition are found true, he faces a two-year period of involuntary commitment, and therefore he should be entitled to the same

number of peremptory challenges provided for a defendant in a criminal case where, as the result of a conviction, the defendant faces two years of imprisonment. (§ 231, subd. (a).)

His reliance upon dicta in *People v. Yates* (1983) 34 Cal. 3d 644, 652-653, in which the court observed that an equal protection problem might exist if it construed former Penal Code section 1070 to allow a lesser number of challenges to a defendant who faces a greater period of confinement than a similarly situated person charged under a different criminal statute, is misplaced because a person facing a commitment proceeding under the SVPA is simply not "similarly situated" to a person facing criminal prosecution. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J*. (1979) 25 Cal.3d 522, 530; see also *Cooley, supra*, 29 Cal.4th at pp. 253-254.) Criminal prosecution and incarceration serves the purposes of punishment and deterrence. By contrast civil commitment under the SVPA is linked to management and care of a person rendered dangerous due to a mental disorder. Sexually violent predators are segregated from the general prison population and are under the supervision of the Department of Mental Health. (*Hubbart I*, supra, 19 Cal.4th at pp. 1175-1176.) Moreover, unlike a criminal prosecution that affixes criminal liability and punishment for a particular act, the purpose of an SVPA proceeding is to determine whether a person suffers from a certain mental disorder that is subject to change, and must be redetermined at least every two years. (See *id.* at pp. 1170-1179 [court enumerates differences in purpose and procedures between criminal prosecution and an SVPA proceeding].) A person alleged to be a sexually violent predator and a criminal defendant therefore are simply not similarly situated, and equal protection principles do not require that a sexually violent predator defendant be provided the same number of peremptory challenges as a defendant facing criminal prosecution.

II.

Diagnosis of Current Mental Disorder

Defendant next contends his commitment under the SVPA violates his constitutional ex post facto and due process rights because the term "mental disorder" is defined so loosely that he could be found to be suffering from such a disorder based solely upon his past offenses. (See *Foucha v. Louisiana* (1992) 504 U.S. 71 [state may not involuntarily commit an individual based solely on past criminal conduct and antisocial personality traits].) He acknowledges that, in *Hubbart, supra,* 19 Cal.4th 1138, the court rejected a facial challenge to the definition of "mental disorder" in the SVPA on these grounds, and explained that *Foucha* did not hold that "past criminal conduct play[s] no proper role in the commitment determination." (*Foucha*, at p. 1161.)[4] Nevertheless, in reliance upon the concurring opinion of Justice Werdegar in *Hubbart*, *supra,* defendant argues that, as applied to him, a constitutional violation did occur because the experts made their diagnoses of paraphilia, and formed their opinion that he suffers from a mental disorder as defined in the SVPA, based solely on his past offenses.

In *People v. Talhelm* (2000) 85 Cal.App.4th 400, 408-410, the court rejected essentially the same argument. We agree with its analysis: "Defendant relies primarily on the concurring opinion of Justice Werdegar, joined by Justice Kennard, in *Hubbart*. The concurring justices observed that while the Act's definition of the term 'diagnosable mental disorder' was not in violation of the substantive due process clause on its face or as applied to the defendant in *Hubbart*, the outcome might be different if the state uses the Act to involuntarily commit a person based on his or her prior offenses 'absent "a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." ' [Citation.] The concurring opinion elaborated further that a diagnosis based primarily on the person's prior offenses adds little to the reliability of the finding that a

[4] The SVPA is not unconstitutional because "the definition of a 'diagnosed mental disorder' does not expressly exclude antisocial personality disorders or other conditions

person is a sexually violent predator likely to engage in future sexually violent behavior if released. [Citation.] [¶] While we are mindful of Justice Werdegar's concern, we are convinced that defendant was found a sexually violent predator in full compliance with his substantive due process rights . . . . [T]wo qualified mental health professionals testified that defendant was a pedophile, and that he would likely engage in future sexually violent behavior if released into the community without treatment. The expert testimony was based not only on defendant's prior convictions, but also on the results of clinical tests and personal interviews with defendant as well as evidence that defendant's daughter claimed he had molested her. [¶] Finally, the jury was instructed that although it could consider defendant's priors as evidence that he was a sexually violent predator, it could not find defendant a sexually violent predator based only upon the priors without relevant evidence of a currently diagnosed mental disorder. Absent evidence to the contrary, we must assume that the jury followed the court's instructions. [Citation.]." (*Id*. at p. 409.)

Similarly, here, two qualified mental health professions testified that defendant suffered from a mental disorder as defined under the SVPA, and that he would likely reoffend if released into the community. As in *Talhelm*, *supra*, 85 Cal.App.4th 400, the record also establishes that these experts did not rely solely on defendant's past offenses. The experts identified numerous other factors they relied upon in diagnosing defendant with a mental disorder that impaired his volitional capacity as defined under the SVPA. For example, Dr. Starr explained that the diagnosis of paraphilia cannot be based solely upon the fact that the defendant has committed or been convicted of rapes, and that only a very small percentage of rapists actually suffer from the disorder. Instead, it is necessary to examine the underlying behavior, circumstances, and patterns that show an addictive or compulsive component. In defendant's case, she relied upon factors such as (1) the number of victims, and the repetitive pattern of nonconsensual sexual activity from 1989

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characterized by an inability to control violent antisocial behavior, such as paraphilia." (*Hubbart I*, *supra*, 19 Cal.4th at p. 1158.)

to 1993; (2) his ability and willingness to continue having sex with a victim even after she defecated; (3) that he performed poorly while on parole, and committed new offenses even while under supervision on parole and after having been incarcerated for the prior offense; (4) he committed the second qualifying rape hours after a failed attempt on another victim, instead of gaining control of himself; (5) his recent contact with a female guard in violation of prison rules indicated that he still violated boundaries with females even in institutional settings; (6) in 1999 he told a doctor that he was embarrassed by his crimes, and found it hard to believe that he could do such a thing; (7) he had a significant history of substance abuse; and (8) he had refused treatment. Dr. Padilla agreed that the diagnosis of paraphilia is not based merely upon the commission of forcible rape, but also upon behaviors and patterns. Dr. Padilla relied upon many of the same factors identified by Dr. Starr, such as the number and pattern of offenses, rule-breaking behavior towards a female guard while in prison,, and apologetic behavior after the rapes, all of which indicated the persistence of the deviant sexual interest, and compulsion. Moreover, also as in *Talhelm*, *supra*, the jury was instructed that it could not find defendant was a "sexually violent predator based on prior offenses without relevant evidence of a currently diagnosed mental disorder."

Defendant argues the reasoning in *Talhelm*, *supra*, 85 Cal.App.4th 400 is flawed because, even under the instructions given, a jury could find the allegations true based upon an expert's diagnosis without evaluating whether the diagnosis itself is based only upon past offenses. The jury was also instructed that it is not bound by an expert opinion, and that an opinion is "only as good as the facts and reasons on which it is based," and it should give an opinion only the weight it finds the opinion deserves. Reading the instructions as a whole, no reasonable juror could conclude that it may find the defendant is a sexually violent predator based on a expert opinion that relies solely upon the commission of the past offenses. Moreover, even if it were possible for the jury to construe the instructions in the manner defendant suggests, it would make no difference in the outcome of this case, because the expert opinion was not, in fact, based solely upon

past offenses. There is no possibility that the jury in this case found defendant to be suffering from a mental disorder based solely upon his past offenses.

III.

Expert Testimony Regarding Prior Incidents of Sexual Assaults

Over defendant's objection, the court permitted Drs. Padilla and Starr to testify about three uncharged rapes as part of the basis of their opinion. Defendant contends the accounts of these rapes were hearsay, and the information was too unreliable to form the basis of the expert opinion and should have been excluded.

In *People v. Gardeley* (1996) 14 Cal.4th 605, the court explained the relevant principles as follows: "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion on reliable hearsay, including out-of-court declarations of other persons'] . . . . And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. . . . [¶] A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay'. . . [and] 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' " (*Id.* at pp. 618-619.) In recognition of the inevitable conflict between the accused's interest in avoiding substantial use of unreliable hearsay and the need of the jury to have sufficient information to evaluate the expert's opinion, "disputes in this area must generally be left to the trial court's sound judgment." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)"[5]

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[5] Defendant relies upon *People v. Coleman* (1985) 38 Cal.3d 69, 92 for the blanket proposition that a psychologist cannot repeat the details of inadmissible hearsay in the guise of supporting his opinion. His reading of *Coleman* is overbroad. The court also

The trial court understood and applied these principles. It held two Evidence Code section 402 hearings to evaluate the reliability of the hearsay statements upon which the doctors were relying. It ruled that some information, such as arrest notations in defendant's criminal record, did not meet the threshold standard of reliability. It allowed the doctors to testify concerning the other uncharged incidents only after finding that they met this threshold standard.

With respect to the first uncharged incident, the rape of Debbie W. in 1989, the record clearly supports the court's exercise of discretion. The police interviewed Debbie W. during the 1989 investigation of the rape of Ada R., and Debbie W. identified defendant in a lineup. When the police questioned defendant, he admitted having sexual relations with Debbie W. but claimed it was consensual. The charges with respect to Debbie W. were dropped when she did not appear at the preliminary hearing. The court allowed the experts to relate this uncharged incident to the jury only as part of the basis for their opinion. Its ruling was based upon the rational conclusion that Debbie W.'s identification of defendant in a lineup, and her detailed description of the rape, also contained in a police report, were sufficient indicia of reliability.

Nor did the court abuse its discretion in allowing expert testimony concerning statements L.M. made to the police in 1993 regarding other victims of defendant. When interviewed by the police, L.M. stated that she felt uncomfortable around defendant because she knew of two other women in her neighborhood who had been raped by him, Yolanda E. and Cheryl R. Defendant argued that L.M.'s statement concerning other victims was based upon nothing but rumor or gossip. The court, however, was within its discretion to allow expert testimony concerning an uncharged incident involving Yolanda, based upon its reasoning that the police report indicated that Yolanda personally told L.M. that defendant had raped her. With respect to Cheryl R., in addition to L.M.'s statement that she had heard Cheryl R. was raped by defendant, Cheryl R.

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observed that a limiting instruction will normally cure the hearsay problem, and where it may not, the court also retains the discretion, under Evidence Code section 352, to limit

herself also made a police report of an assault by defendant, although the report did not appear to have been of a sexual assault. The court was within its discretion to conclude, despite the fact L.M.'s reference to Cheryl R. was hearsay, there were sufficient indicia of reliability to permit the experts to rely upon it as part of the basis for expert opinion, and defendant's concerns could be adequately addressed through cross-examination and argument regarding the strength and weight of the opinion, in light of the reliability of the basis for it.

IV.

Admission of Police Report

In every SVPA case, the prosecution has the burden of proving the defendant has been convicted of "sexually violent" offenses against two or more victims. (Welf. & Inst. Code, § 6600, subd. (a)(1).) In part to relieve victims of the burden and trauma of testifying about the crimes underlying the prior convictions, in 1996 the Legislature amended the SVPA to allow documentary evidence, including multiple-level hearsay, to prove the details of these predicate sex offenses. (Welf. & Inst. Code, § 6600, subd. (a)(3); *People v. Otto* (2001) 26 Cal.4th 200, 208.)

Defendant acknowledges this express statutory exception to the general rule of inadmissibility of hearsay. He nevertheless contends the court erred by admitting a 1993 police report detailing the rape of Catherine K. He argues that the rationale for the hearsay exception provided in Welfare and Institutions Code section 6600, subdivision (a)(3), and as articulated in *People v. Otto*, *supra*, 26 Cal 4th 200, is inapplicable because a jury in his prior SVPA trial had already found that he had been convicted of sexually violent offenses against more than two victims, and he was willing to stipulate to this element. Moreover, his convictions were for forcible rape, the definition of which, without further proof of the details, satisfies the SVPA's sexually violent offense requirement. Defendant concludes the hearsay evidence in the 1993 police report was not necessary to prove the predicate offenses, and even if relevant for any other purpose, it

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the expert's references to hearsay. (*People v. Coleman*, at p. 92.)

was outside the scope of the hearsay exception established by Welfare and Institutions Code section 6600, subdivision (a)(3).

The contention fails for several reasons. First, by its terms the hearsay exception set forth in Welfare and Institutions Code section 6600, subdivision(a)(3) is not limited to proving the existence of the predicate offenses. Instead, it more broadly specifies that hearsay evidence of the details underlying a "prior conviction" may be used to support the determination that a "person is a sexually violent predator."[6] Therefore, hearsay evidence of the facts underlying the qualifying conviction may be used not only to establish two predicate offenses, but also a diagnosed mental condition and a finding that the defendant is likely to reoffend. (See *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1234 (*Hubbart II*.)

Second, even where the prior predicate offenses have already been established, all of the justifications for an exception identified in *Otto, supra*, 26 Cal.4th at pp. 210-214 would still apply to the use of documentary hearsay concerning the details of these offenses as relevant to other issues underlying the ultimate finding that the defendant is a sexually violent predator. The prosecution had the right to present relevant evidence that would aid the jury in evaluating the basis for the doctors' diagnoses, and prediction of likelihood of reoffending. To the extent that the doctors relied upon the facts of the underlying offenses, the admission of the police report itself allowed the jury independently to evaluate the basis for their opinions. (See *Hubbart II, supra,* 88 Cal.App.4th at p.1234 ["details of the crimes were helpful for the jury's understanding of the expert's opinion and diagnoses"].) As was the case in *Otto, supra*, defendant had pleaded guilty, which was a strong indicator of the trustworthiness of the 1993 police

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[6] Welfare and Institutions Code section 6600, subdivision (a) (3) provides, in relevant part: "Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person *is a sexually violent predator,* but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence . . . including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health." (Italics added.)

report. (*Id*. at pp. 1210-1211.) Defendant also did not specifically challenge the accuracy of any of the details in that report. (*Id*. at p. 1213.) Moreover, he had the opportunity to present his own experts and cross-examine the prosecution's experts. (*Id*. at pp. 1214-1215.) Finally, the government's interest is at least as strong as in *Otto*, because use of live witnesses to support the evidentiary basis of the expert witnesses would be just as traumatizing to the victims as requiring such testimony to prove the predicate offenses. (*Ibid*.)[7]

In any event, the admission of the police report is harmless under any standard, because the jury had already heard many of the most disturbing details of the offense through the testimony of Drs. Padilla and Starr, and the details were not seriously disputed. Even if, as defendant contends, some other facts, not contained in the 1993 report, put his conduct in a more favorable light, the admission of the report did not prevent him from bringing these facts to light through cross-examination of the experts.

V.

Instructional Error

Finally, defendant raises two claims of instructional error, both of which have been definitively rejected by our state Supreme Court, and we are, of course, bound by those decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

First, he contends the court should have supplemented CALJIC 4.19 with his proposed instruction that the jury must find that he had serious difficulty controlling his

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[7] The recent decision in *Crawford v. Washington* (2004) 541 U.S. ___ does not compel a different conclusion. Crawford concerns only the scope of the Sixth Amendment right of confrontation under the federal Constitution, in a criminal prosecution. An SVP trial is a *civil* proceeding. In *Otto*, *supra*, the court explained, "There is no right to confrontation under the state and federal confrontation clause in civil proceedings." (*People v. Otto*, *supra*, 26 Cal.4th at p. 214.) The court in *Otto* did recognize that there is a due process right to confrontation and cross-examination of witnesses, but the analysis of the Sixth Amendment right in *Crawford* simply does not apply to a civil proceeding such as a SVP trial. (*Id.*; see also *Morrissey v. Brewer* (1972) 408 U.S. 471, 489 [court distinguished Sixth Amendment right of confrontation from Fifth Amendment right to confront and cross-examine witnesses to ensure fairness in other proceedings].)

sexually violent behavior. In *People v. Williams* (2003) 31 Cal.4th 757, the court considered and rejected the same argument. It held that "a commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one's criminal sexual violence, as required by *Kansas v. Crane*, [2002] 534 U.S. 407. Accordingly, separate instructions or findings on that issue are not constitutionally required, and no error arose from the court's failure to give such instructions in defendant's trial." (*Id.* at p. 777.)

Second, defendant contends that the instruction the court gave defining "likely," in accordance with *People v. Superior Court (Ghilotti)* (2002) 27 Cal. 4th 888, to mean "that the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes upon his release into the community," establishes a standard so low that it violates due process. That contention is foreclosed by the decision in *People v. Roberge* (2003) 29 Cal.4th 979, 988, in which the court approved such an instruction.

CONCLUSION

The judgment is affirmed.

_____
STEIN, J.

We concur:

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MARCHIANO, P.J.

_____
SWAGER, J.

Trial Court:	The Superior Court of Contra Costa County
Trial Judge:	Hon. John C. Minney
Counsel for Defendant and Appellant:	Ozro William Childs
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